

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBERT S. PHILLIPS,

Plaintiff,

V.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,¹

Defendant.

Case No. C16-5451-JCC

ORDER REVERSING AND REMANDING CASE FOR FURTHER ADMINISTRATIVE PROCEEDINGS

Robert S. Phillips seeks review of the denial of his Title II application for Disability

Insurance Benefits (DIB). Mr. Phillips contends the ALJ erred in evaluating the credibility of his own symptom testimony as well as the medical opinion evidence. Dkt. 13 at 2. Mr. Phillips contends these errors resulted in a residual functional capacity (RFC) determination that failed to account for all of his limitations. *Id.* Mr. Phillips further argues that the vocational expert's (VE's) testimony is inconsistent with the Dictionary of Occupational Titles (DOT) and, therefore, substantial evidence does not support the ALJ's finding, at step five, that he can perform other jobs in the national economy. *Id.* at 2, 14. Mr. Phillips contends this matter

¹ Nancy A. Berryhill is now the Acting Commissioner of the Social Security Administration. Pursuant to Federal Rule of Civil Procedure 25(d), Nancy A. Berryhill is substituted for Carolyn W. Colvin as defendant in this suit. The Clerk is directed to update the docket, and all future filings by the parties should reflect this change.

1 should be remanded for an award of benefits or, alternatively, for further administrative
2 proceedings. *Id.* at 16. As discussed below, the Court **REVERSES** the Commissioner's final
3 decision and **REMANDS** the matter for further administrative proceedings under sentence four
4 of 42 U.S.C. § 405(g).

5 **BACKGROUND**

6 In April 2013, Mr. Phillips applied for benefits, alleging disability as of March 12, 2012.²
7 Tr. 22. Mr. Phillips' applications were denied initially and on reconsideration. Tr. 22, 70-88.
8 After the ALJ conducted a hearing on November 18, 2014, he issued a decision finding Mr.
9 Phillips not disabled. Tr. 22-31.

10 **THE ALJ'S DECISION**

11 Utilizing the five-step disability evaluation process,³ the ALJ found:

12 **Step one:** Mr. Phillips has not engaged in substantial gainful activity since March 12,
13 2012, the alleged onset date.

14 **Step two:** Mr. Phillips has the following severe impairments: cervical degenerative disc
15 disease with spondylosis and radiculitis, status-post discectomy with fusion and
16 instrumentation, with mild face degeneration; coronary artery disease with angina;
tensynovitis right hand.

17 **Step three:** These impairments do not meet or equal the requirements of a listed
18 impairment.⁴

19 **Residual Functional Capacity:** Mr. Phillips can perform sedentary work as defined in
20 20 C.F.R. 404.1567(a) except he could stand or walk for two hours in an eight-hour

21 ² The Court notes that the application for DIB in the record indicates that Mr. Phillips is alleging disability
as of May 27, 2011, while the ALJ's decision and Mr. Phillips' Opening Brief indicate he is alleging
disability as of March 12, 2012. Tr. 22, 170; Dkt. 13 at 2. Neither party identifies this apparent
discrepancy nor does it affect the Court's ultimate determination here as to whether the ALJ's non-
disability finding is supported by substantial evidence and free of legal error. However, on remand, the
ALJ is directed to clarify any discrepancy in the record regarding the alleged onset date.

22 ³ 20 C.F.R. §§ 404.1520, 416.920.

23 ⁴ 20 C.F.R. Part 404, Subpart P, Appendix 1.

1 workday; he could sit for six hours in an eight-hour workday; he could never climb
2 ladders, ropes or scaffolds; he could occasionally balance, stoop, crouch, kneel, crawl, or
3 climb ramps or stairs; he could frequently complete rotation, flexion or extension of the
4 neck; he could occasionally perform overhead reaching bilaterally; he could frequently
5 handle and finger bilaterally; he should avoid concentrated exposure to vibration and
6 hazards, including using of moving machinery and unprotected heights.

7 **Step four:** Mr. Phillips cannot perform past relevant work.

8 **Step five:** As there are jobs that exist in significant numbers in the national economy that
9 Mr. Phillips can perform, he is not disabled.

10 Tr. 22-31. The Appeals Council denied Mr. Phillips' request for review making the ALJ's
11 decision the Commissioner's final decision. Tr. 1-6.⁵

DISCUSSION

A. Mr. Phillips' Symptom Testimony

12 Mr. Phillips contends the ALJ erred in evaluating the credibility of his symptom
13 testimony. Dkt. 13 at 2-7. The Court disagrees.

14 “In assessing the credibility of a claimant’s testimony regarding subjective pain or the
15 intensity of symptoms, the ALJ engages in a two-step analysis.” *Molina v. Astrue*, 674 F.3d
16 1104, 1112 (9th Cir. 2012) (citing *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009)). “First,
17 the ALJ must determine whether the claimant has presented objective medical evidence of an
18 underlying impairment which could reasonably be expected to produce the pain or other
19 symptoms alleged.” *Vasquez*, 572 F.3d at 591. “If the claimant meets the first test and there is
20 no evidence of malingering, the ALJ can only reject the claimant’s testimony about the severity
21 of the symptoms if she gives ‘specific, clear and convincing reasons’ for the rejection.” *Id.*
22 (quoting *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir.2007)). “General findings are
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⁵ The rest of the procedural history is not relevant to the outcome of the case and is thus omitted.
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1 insufficient; rather, the ALJ must identify what testimony is not credible and what evidence
2 undermines the claimant's complaints." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).
3 Here, the ALJ provided several clear and convincing reasons for discounting Mr. Phillips'
4 testimony.

5 In evaluating the credibility of a claimant's testimony, the ALJ may consider a range of
6 factors including prior inconsistent statements concerning symptoms, inconsistency with the
7 medical evidence, as well as the claimant's daily activities. *See Ghanim v. Colvin*, 763 F.3d
8 1154, 1163 (9th Cir. 2014); *Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir. 1995). Although,
9 once evidence demonstrating a medically determinable impairment has been provided an ALJ
10 may not discredit a claimant's testimony solely as unsupported by objective medical evidence,
11 *Bunnell v. Sullivan*, 947 F.2d 341, 343, 346-47 (9th Cir. 1991), an ALJ may discredit a
12 claimant's testimony when it contradicts evidence in the medical record. *Johnson*, 60 F.3d at
13 1434. Here, the ALJ reasonably discounted the credibility of Mr. Phillips' testimony based on
14 inconsistencies between his allegations and the medical record. Tr. 27-28. Specifically, the ALJ
15 noted that during a March 2014 independent medical examination (IME) with Dr. Kretschmer,
16 Mr. Phillips walked with a cane which he claimed was necessary due to balance trouble when
17 moving his head. Tr. 27-28, 695. However, on examination by his treating provider, Brendon B.
18 Hutchinson, M.D., one day prior to Dr. Kretschmer's IME, Mr. Phillips was noted to ambulate
19 normally and without an assistive device. Tr. 599. This evidence from Mr. Phillips' treating
20 provider also tends to contradict Mr. Phillips' hearing testimony that he uses a cane daily for any
21 walking or standing. Tr. 53. Mr. Phillips does not challenge this basis for discounting his
22 credibility and, under the circumstances, the ALJ reasonably found Mr. Phillips' allegation that
23 he needed a cane for balance inconsistent with the medical evidence and that the inconsistency

1 undermined the credibility of his symptom testimony.

2 The ALJ also reasonably found Mr. Phillips' allegation that he was unable to work, in
3 part, due to weakness in both of his arms inconsistent with examinations subsequent to his
4 cervical spinal fusion surgery which demonstrated normal strength. Tr. 27-28, 51, 53.
5 Specifically, the ALJ notes that in March 2013, Dr. Kretschmer noted 5/5 strength throughout, in
6 November 2013, Carlos Moravek, M.D., found 5/5 strength in both upper extremities, in June
7 2014, Dr. Hutchinson noted 5/5 muscle strength and in September 2014, Dr. Weinstein noted that
8 muscle testing revealed no weakness. Tr. 27-28, 552, 613, 689, 707. The ALJ also reasonably
9 found the medical evidence here inconsistent with Mr. Phillips' allegations and properly
10 discounted the credibility of his testimony on this basis.⁶

11 Accordingly, the ALJ did not err in discounting the credibility of Mr. Phillips' symptom
12 testimony.

13 **B. Medical Opinion Evidence**

14 In general, more weight should be given to the opinion of a treating physician than to a
15 non-treating physician, and more weight to the opinion of an examining physician than to a
16 nonexamining physician. *See Lester*, 81 F.3d at 830. Where a treating or examining doctor's
17 opinion is not contradicted by another doctor, it may be rejected only for clear and convincing
18 reasons. *Id.* Where contradicted, a treating or examining physician's opinion may not be
19 rejected without "specific and legitimate reasons supported by substantial evidence in the record

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21 ⁶ The ALJ also gave other reasons for discounting Mr. Phillips' testimony. However, the Court need not
22 address these other reasons in detail because, even if erroneous their inclusion is harmless as they do not
23 negate the ALJ's other valid reasons for discounting Mr. Phillips' testimony. *See Carmickle v. Comm'r,
Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008) (including an erroneous reason, among other
reasons for discounting a claimant's testimony, is at most harmless error if the other reasons are supported
by substantial evidence and the erroneous reason does not negate the validity of the overall
determination).

1 for so doing.” *Id.* at 830-31. “An ALJ can satisfy the ‘substantial evidence’ requirement by
2 ‘setting out a detailed and thorough summary of the facts and conflicting clinical evidence,
3 stating his interpretation thereof, and making findings.’” *Garrison v. Colvin*, 759 F.3d 995, 1011
4 (9th Cir. 2014) (quoting *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998)). “The
5 Commissioner may reject the opinion of a non-examining physician by reference to specific
6 evidence in the medical record.” *Sousa v. Callahan*, 143 F.3d 1240, 1244 (9th Cir. 1998).

7 **1. Louis F. Kretschmer, M.D.**

8 Mr. Phillips contends the ALJ erred in evaluating Dr. Kretschmer’s opinions that he
9 could not have “repetitive usage of the cervical spine in a non-ergonomic position.” Dkt. 13 at
10 7-11; Tr. 709. The Court agrees.

11 In March 2013, Dr. Kretschmer opined that Mr. Philips could not have repetitive usage of
12 the cervical spine in a non-ergonomic position but noted that this was a temporary restriction of
13 unknown duration. Tr. 709. In March 2014, Dr. Kretschmer made this restriction permanent.⁷
14 Tr. 697. The ALJ gave “some weight” to Dr. Kretschmer’s opinions “to the extent they are
15 consistent with the above residual functional capacity” and indicated that “Dr. Kretschmer’s
16 concerns are accommodated by the above residual functional capacity.” Tr. 29. Substantial
17 evidence does not support this finding as the ALJ neither properly rejected nor accounted for Dr.
18 Kretschmer’s limitation in the RFC or in the hypothetical to the VE.

19 The Commissioner argues that the ALJ’s restriction in the RFC to “frequent rotation,
20 flexion or extension of the neck” accommodates Dr. Kretschmer’s limitation to no “repetitive
21 usage of the cervical spine.” Dkt. 14 at 12. However, the Commissioner misconstrues Dr.

22 ⁷ The ALJ, and the Commissioner, indicate that it was Dr. Hutchinson who made this restriction
23 permanent. Tr. 28-29; Dkt. 14 at 12. However, upon reviewing the record, and the pages cited by the
ALJ, it appears that it was Dr. Kretschmer again, not Dr. Hutchinson, who made this limitation
permanent. Tr. 693-698, 701-711.

1 Kretschmer's opinion, ignoring the fact that Dr. Kretschmer's limitation is not simply to no
2 "repetitive usage of the cervical spine" but to no "repetitive usage of the cervical spine *in a non-*
3 *ergonomic position.*" Tr. 709 (emphasis added). There is no medical opinion or other evidence
4 indicating that a restriction to frequent rotation, flexion or extension of the neck adequately
5 accommodates Dr. Kretchmer's limitation to no repetitive usage of the cervical spine in a non-
6 ergonomic position. Nor, on its face, is a restriction to frequent rotation, flexion or extension of
7 the neck clearly equivalent to a restriction to no repetitive usage of the cervical spine in a non-
8 ergonomic position. That is to say, even if a job required only frequent rotation, flexion or
9 extension of the neck, it might still require repetitive use of the cervical spine in a non-
10 ergonomic position, i.e., a job might require an individual to sit bent over a conveyor belt or in
11 an otherwise non-ergonomic position. *See, e.g., Lobato v. Astrue*, No. 10-02022, 2011 WL
12 4712212 at *12 (N.D. Cal. Oct. 7, 2011) (finding the ALJ harmfully erred in failing to properly
13 reject or account for a limitation requiring an ergonomic work station and noting the VE's
14 testimony that such limitation becomes a "'significant vocational factor' that could limit
15 employment due to inability to properly access the work space without modifications.").

16 Accordingly, the ALJ harmfully erred in failing to either properly reject or account for
17 Dr. Kretchmer's limitation in the RFC or in the hypothetical to the VE. *See Stout v. Comm'r,*
18 *Soc. Sec. Admin.*, 454 F.3d 1050, 1055-56 (9th Cir. 2006) (An error is harmless only if it is
19 "inconsequential to the ultimate nondisability determination" and a Court cannot consider an
20 error harmless unless it can "confidently conclude that no reasonably ALJ, when fully crediting
21 the testimony, could have reached a different disability determination."); and *see Matthews v.*
22 *Shalala*, 10 F.3d 678, 681 (9th Cir. 1993) ("If a vocational expert's hypothetical does not reflect
23 all the claimant's limitations, then the expert's testimony has no evidentiary value to support a

1 finding that claimant can perform jobs in the national economy.”). On remand, the ALJ should
2 reevaluate Dr. Kretchmer’s opinions.

3 **2. Mitchell A. Weinstein, M.D.**

4 Mr. Phillips contends the ALJ erred in evaluating Dr. Weinstein’s opinion that he had a
5 “permanent restriction regarding excessive movement of his cervical spine due to pain.” Tr.
6 686-692; Dkt. 13 at 10-11. The Court agrees.

7 In September 2014, Dr. Weinstein performed an independent medical examination of Mr.
8 Phillips. Tr. 686-692. Dr. Weinstein indicated diagnoses of herniated cervical disc, left C6-7,
9 status post anterior cervical disectomy and plated fusion, C6-7, and preexisting degenerative
10 cervical disc disease. Tr. 690. Dr. Weinstein noted cervical range of motion findings of 20
11 degrees flexion, 20 degrees extension, 25 degrees left and right lateral bending, and 40 degrees
12 head turning to each side. Tr. 689. Dr. Weinstein opined that Mr. Phillips had a “permanent
13 restriction regarding excessive movement of his cervical spine due to pain.” Tr. 690. The ALJ
14 again gave “some weight” to Dr. Weinstein’s opinion “to the extent it is consistent with the
15 above residual functional capacity” and further found that “Dr. Weinstein’s concerns are
16 accommodated by the above residual functional capacity.” Tr. 29. The ALJ limited Mr. Phillips
17 in the RFC to “frequent rotation, flexion and extension of the neck.” Tr. 25.

18 Mr. Phillips argues that the RFC limitation to frequent rotation, flexion and extension of
19 the neck does not adequately account for Dr. Weinstein’s opinion. Dkt. 13 at 11. The
20 Commissioner argues that the RFC does adequately account for Dr. Weinstein’s opinion. Dkt.
21 14 at 12. The Court agrees with Mr. Phillips. Dr. Weinstein’s opinion does not define what he
22 means by “excessive movement” and, thus, it is unclear whether a limitation to frequent rotation,
23 flexion and extension of the neck adequately accounts for this limitation. Tr. 690. Moreover,

1 importantly, Dr. Weinstein's objective examination findings reflect significantly reduced
2 cervical range of motion which would tend to indicate that his restriction on "excessive
3 movement" may refer, at least partly, to his cervical range of motion rather than simply the
4 frequency of movement. Tr. 689-690. To the extent Dr. Weinstein's restriction on excessive
5 movement refers to range of movement rather than or in addition to frequency of movement, the
6 RFC limitation to frequent rotation, flexion and extension of the neck would not properly
7 account for Dr. Weinstein's opinion. The Court notes that cervical range of motion limitations
8 may very well limit an individual's ability to perform certain jobs. *See, e.g., Oliver v. Comm'r*
9 *Soc. Sec. Admin.*, No. 12-02143, 2014 WL 795101, at *3 (D. Or. Feb. 27, 2014) (cervical range
10 of motion limitations "preclude the ability to perform a great number of jobs."); *and see Brown*
11 *v. Colvin*, No. 15-1997, 2016 WL 2865233, at *3 (W.D. Wash. May 17, 2016) ("[p]laintiff's
12 inability to perform repetitive cervical rotation or extension is related to her ability to be
13 employed, and is therefore significant, probative evidence."). "In Social Security cases the ALJ
14 has a special duty to fully and fairly develop the record and to assure that the claimant's interests
15 are considered." *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir. 1983). "Ambiguous evidence,
16 or the ALJ's own finding that the record is inadequate to allow for proper evaluation of the
17 evidence, triggers the ALJ's duty to 'conduct an appropriate inquiry.'" *Tonapetyan v. Halter*,
18 242 F.3d 1144, 1150 (9th Cir. 2001) (quoting *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir.
19 1996)). Without further development the record is ambiguous as to whether the ALJ's RFC
20 limitation to frequent rotation, flexion and extension of the neck, adequately accounts for Dr.
21 Weinstein's opinion. Accordingly, on remand, the ALJ should develop the record as necessary
22 to clarify Dr. Weinstein's opinion and reevaluate that opinion.

23 **3. Dale Thuline, M.D.**

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1 Mr. Phillips contends the ALJ erred in evaluating State consulting physician Dr.
2 Thuline's opinion with respect to his ability to push and pull with his upper extremities. Dkt. 13
3 at 13. The Court agrees.

4 In October 2013, Dr. Thuline reviewed Mr. Phillips' records and opined, among other
5 things, that he could not perform repetitive pushing or pulling with the bilateral upper
6 extremities. Tr. 29, 85. The ALJ gave "some weight" to Dr. Thuline's opinion "to the extent
7 that it is consistent with the above residual functional capacity." Tr. 29. The Commissioner
8 does not dispute that the ALJ erred in failing to either properly reject Dr. Thuline's opinion or
9 include it in the RFC and hypothetical to the VE. Dkt. 14 at 13. However, the Commissioner
10 argues this error is harmless because the jobs identified by the VE "do not describe duties
11 involving pushing or pulling." *Id.*

12 "The ALJ may meet his burden at step five by asking a vocational expert a hypothetical
13 question based on medical assumptions supported by substantial evidence in the record reflecting
14 all the claimant's limitations, both physical and mental, supported by the record." *Valentine v.*
15 *Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 690 (9th Cir. 2009). "If a vocational expert's
16 hypothetical does not reflect all the claimant's limitations, then the expert's testimony has no
17 evidentiary value to support a finding that claimant can perform jobs in the national economy."
18 *Matthews v. Shalala*, 10 F.3d 678, 681 (9th Cir. 1993). Here neither the RFC nor the
19 hypothetical presented to the VE included Dr. Thuline's limitation that Mr. Phillips was unable
20 to perform repetitive pushing or pulling with the bilateral upper extremities. In light of the
21 incomplete hypothetical, the VE's testimony lacks evidentiary value to support a finding that Mr.
22 Phillips can perform jobs in the national economy. The Court declines to speculate whether the
23 jobs identified by the ALJ would or would not, in fact, be precluded by Dr. Thuline's limitation

1 on pushing or pulling with the bilateral upper extremities. Some of the jobs identified by the VE
2 foreseeably require the ability to push and/or pull to some degree.⁸ While it is certainly not at all
3 clear that these jobs would require the ability to push and/or pull repetitively, this is an issue that
4 is more appropriately addressed by the VE, not by the Court in the first instance. Furthermore,
5 as the matter must be remanded and the RFC re-determined due to other errors, on remand, the
6 ALJ should also reevaluate Dr. Thuline's opinion that Mr. Phillips was unable to perform
7 repetitive pushing or pulling with the bilateral upper extremities.

8 **C. Vocational Expert Testimony**

9 Mr. Phillips also contends the VE's testimony is inconsistent the Dictionary of
10 Occupational Titles. Dkt. 13 at 13-15. However, because the ALJ must reevaluate some of the
11 medical opinion evidence, re-determine the RFC and reevaluate steps four and five on remand,
12 the Court does not reach this issue. Alteration of the ALJ's RFC determination on remand may
13 render Mr. Phillips' challenges to the VE's testimony moot.

14 **D. Scope of Remand**

15 In general, the Court has discretion to remand for further proceedings or to award
16 benefits. *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). The Court may remand for
17 further proceedings if enhancement of the record would be useful. *See Harman v. Apfel*, 211
18 F.3d 1172, 1178 (9th Cir. 1990). The Court may remand for benefits where 1) the record is fully
19 developed and further administrative proceedings would serve no useful purpose; 2) the ALJ

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21 ⁸ The job of "toy stuffer" is described as involving tending a machine that blows filler into stuffed toy
shells, inserting wires, depressing pedals, placing toys in boxes, and potentially stuffing toys by hand.
22 *See* DOT 731.685-014. Moreover, the job of "table worker" is described as involving examining squares
(tiles) of felt-based linoleum material passing along a conveyor and replacing missing and substandard
23 tiles. *See* DOT 739.687-182. While the descriptions of these jobs do not specifically indicate that pushing
and/or pulling are required given the descriptions provided of the job duties it is foreseeable that they may
require the ability to push and/or pull to some degree.

fails to provide legally sufficient reasons for rejecting evidence, whether claimant testimony or medical opinion; and 3) if the improperly discredited evidence were credited as true, the ALJ would be required to find the claimant disabled on remand. *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir. 2014). “Where there is conflicting evidence, and not all essential factual issues have been resolved, a remand for an award of benefits is inappropriate.” *Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090, 1101 (9th Cir. 2014).

7 Here, it is not clear from the record that the ALJ would be required to find Mr. Phillips
8 disabled if the evidence were properly considered. There is conflicting medical evidence which
9 must be reweighed and resolved by the ALJ and further development of the record is necessary.
10 Accordingly, the Court finds it appropriate to remand this case for further administrative
11 proceedings.

CONCLUSION

For the foregoing reasons, the Commissioner's final decision is **REVERSED** and this case is **REMANDED** for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

On remand, the ALJ should: (1) reevaluate Dr. Kretschmer's opinions that Mr. Phillips cannot have repetitive usage of the cervical spine in a non-ergonomic position; (2) develop the record and reevaluate Dr. Weinstein's opinion that Mr. Phillips has a permanent restriction regarding excessive movement of his cervical spine due to pain; (3) reevaluate Dr. Thuline's opinion that Mr. Phillips is unable to perform repetitive pushing or pulling with the bilateral upper extremities; and, (4) re-determine the RFC and steps four and five with the assistance of VE testimony as necessary.

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2 DATED this 11th day of May, 2017.

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7 JOHN C. COUGHENOUR
8 United States District Judge
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